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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

EDWARD THEODORE RAY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MAX WILLIAMS, Director of )  
Corrections, Personally and )  
Professionally; RANDY GEER, )  
Central Mail Administrator, )  
Personally and Professionally;) )  
GUY HALL, Superintendent, )  
TRCI, Personally and Pro- )  
fessionally; V. WILSON, Coun- )  
selor/Mailroom Supervisor, )  
Personally and Professionally;) )  
and ALECA NELSON, Superin- )  
tendent Exec. Assist., Per- )  
sonally and Professionally, )  
 )  
Defendants. )  
 )

No. CV-04-863-HU

FINDINGS & RECOMMENDATION/  
ORDER

Edward Theodore Ray  
Two Rivers Correctional Institution  
82911 Beach Access Road  
Umatilla, Oregon 97882

Plaintiff Pro Se

/ / /  
/ / /  
/ / /

1 Hardy Myers  
ATTORNEY GENERAL  
2 Leonard W. Williamson  
SENIOR ASSISTANT ATTORNEY GENERAL  
3 Department of Justice  
1162 Court Street NE  
4 Salem, Oregon 97301-4096

5 Attorneys for Defendants

6 HUBEL, Magistrate Judge:

7 Plaintiff Edward Theodore Ray, an inmate at Oregon's Two  
8 Rivers Correctional Institution (TRCI), brings this 42 U.S.C. §  
9 1983 action against Max Williams, the Director of the Oregon  
10 Department of Corrections (ODOC), Randy Geer, ODOC's Central Mail  
11 Administrator, Guy Hall, TRCI's Superintendent, V. Wilson, TRCI's  
12 mail room supervisor, and Aleca Nelson, Hall's executive assistant.

13 Plaintiff contends that defendants have violated his  
14 constitutional right to free speech under the First Amendment and  
15 the Oregon Constitution, his right to due process under the  
16 Fourteenth Amendment and the Oregon Constitution, and his right to  
17 peaceably assemble under the First Amendment and the Oregon  
18 Constitution. The allegations stem from ODOC's refusal to allow  
19 plaintiff to receive two books he ordered to be delivered to him at  
20 TRCI. He seeks injunctive relief and damages.

21 Defendants move for summary judgment. I recommend that  
22 defendants' motion be granted. Plaintiff moves to strike  
23 defendants' reply and accompanying affidavit. I deny that motion.

24 BACKGROUND

25 On or about November 26, 2003, plaintiff received a  
26 "Publication Violation Notice" informing him that a publication  
27 entitled "Cracking the Code, Third Edition," sent to him at TRCI,  
28 had been rejected by ODOC staff because the publication (1)

1 contained material that threatened or was detrimental to the  
2 security, safety, health, good order, or discipline of the  
3 facility; (2) contained material that threatened or was detrimental  
4 to inmate rehabilitation; or (3) facilitates criminal activity.  
5 Exh. 2 to Compl.; Attchmt 3 to Geer Affid. at p. 1. The  
6 Publication Violation Notice cites specific page numbers of the  
7 publication that were considered objectionable. Id. The  
8 Publication Violation Notice also informs plaintiff that pursuant  
9 to Oregon Administrative Rule (OAR) 291-131-0050, he could request  
10 an independent review of the rejection by writing to the Functional  
11 Unit Manager or his or her designee, and requesting an  
12 administrative review. Plaintiff did so.

13 An administrative review was held on January 19, 2004, and  
14 continued on January 31, 2004. TRCI's mailroom supervisor V.  
15 Wilson conducted the administrative review. Plaintiff contends  
16 that at the first meeting with Wilson, she explained that the  
17 publication provided instruction on how to oppose lawful government  
18 authority through confrontation, described ways to avoid and delay  
19 responsibility, and instructed and advocated that its readers avoid  
20 legal and fiscal responsibilities and personal accountability  
21 through preparation and submission of fraudulent Uniform Commercial  
22 Code (UCC) forms. Exh. 12 to Compl. Plaintiff contends that  
23 Wilson was unable to point to an actual false and fraudulent form  
24 in the book. Id. She denied his request to send the book to his  
25 home at his expense and have the non-offending pages copied and  
26 returned to him. Id.

27 During the continued administrative review on January 31,  
28 2004, plaintiff contends that Wilson indicated that the most

1 appropriate reason for rejecting the book was because of inmate  
2 rehabilitation because throughout the entire book, it advocates  
3 readers to avoid legal and fiscal responsibilities. Exh. 20 to  
4 Compl. He contends that Wilson admitted that she herself did not  
5 understand what a fraudulent UCC form was, but that she was acting  
6 on orders from Geer at Central Mail Administration. Id.

7 On February 18, 2004, Wilson wrote a formal memorandum to  
8 plaintiff affirming the original Publication Violation Notice.  
9 Exh. 38 to Pltff's Compl.; Attchmt 3 to Geer Affid. at p. 4. She  
10 explained that the book was rejected in accordance with OAR 291-  
11 131-0035(2) which allows rejection of material that threatens or is  
12 detrimental to the security, safety, health, good order, or  
13 discipline of the facility, inmate rehabilitation, or facilitates  
14 criminal activity. Id. She noted that pages throughout the  
15 publication advocate that its readers seek to avoid legal and  
16 fiscal responsibilities and personal accountability through the  
17 preparation and submission of false and fraudulent UCC forms and so  
18 called "Redemption Movement" and "Strawman" filings. Id. Hall  
19 reviewed Wilson's decision and affirmed it. Id.

20 After plaintiff received the Publication Violation Notice for  
21 "Cracking the Code, Third Edition," and while he was waiting for  
22 his administrative review of that notice, he received another  
23 Publication Violation Notice, this one for a publication entitled  
24 "One Man Out, The Redemption Process Formulated for those  
25 Incarcerated." Exh. 16 to Compl; Attchmt 4 to Geer Affid. at p. 1.  
26 The same justification was noted for the rejection of "One Man Out"  
27 as had been given for the rejection of "Cracking the Code, Third  
28 Edition." Id. Plaintiff was again advised of his right to an

1 administrative review. Id. He requested a review.

2 Wilson conducted the administrative review of "One Man Out"  
3 with plaintiff on March 16, 2004. Exh. 47 to Compl.; Attchmt 4 to  
4 Geer Affid. at p. 11. According to plaintiff, she informed him  
5 that Geer had determined that the publication threatened the  
6 safety, security, health, etc. of the facility and also facilitated  
7 criminal activity. Exh. 47 to Pltff's Compl. Plaintiff states that  
8 he reviewed several pages of the rejected publication that Wilson  
9 had with her and asked Wilson to show him exactly where the pages  
10 constituted a threat to safety, security, etc. Id. He further  
11 states that she refused to do so and she stopped the review. Id.

12 Wilson affirmed the rejection of the publication. Attchmt 4  
13 to Geer Affid. at p. 1. Her recommendation was upheld by P. Hoeye  
14 on March 24, 2004. Id.

15 As Central Mail Administrator, Geer reviews publications for  
16 content that violates ODOC rules. Geer Affid. at ¶ 4. When he  
17 determines that a publication violates the rules, he sends a  
18 memorandum to all ODOC facilities, statewide, requesting that they  
19 reject the publication. Id. Publications that do not comply with  
20 the rules are returned to the publisher, triggering a Publication  
21 Violation Notice to the sender and the intended inmate recipient.  
22 Id. at ¶ 5. The inmate can then request an administrative review  
23 as plaintiff did in this case.

24 Geer issued a statewide memorandum on January 31, 2003,  
25 regarding "Cracking the Code, Third Edition." Id. at ¶ 8; Attchmt  
26 3 to Geer Affid. at pp. 2-3. In that memorandum, Geer cited to  
27 particular pages of the publication and also noted that other  
28 unspecified pages throughout the book instructed and advocated that

1 its readers seek to avoid legal and fiscal responsibilities and  
2 personal accountability through the preparation and submission of  
3 false and fraudulent UCC forms and so-called "Redemption Movement"  
4 and "Strawman" filings. Id. at p. 1. He also noted that pages 23-  
5 24 instructed and advocated direct action to oppose and challenge  
6 lawful governmental authority through confrontation. Id.

7 On January 14, 2004, Geer issued a statewide memorandum  
8 regarding "One Man Out." Geer Affid. at ¶ 13; Attchmt 4 to Geer  
9 Affid. at pp. 9-10. In the memorandum, Geer stated that materials  
10 throughout the publication threaten, or are detrimental to, the  
11 security, safety, health, good order, or discipline of the  
12 facility, inmate rehabilitation, or facilitates criminal activity.  
13 Attchmt 4 to Geer Affid. at p. 9.

#### 14 STANDARDS

15 Summary judgment is appropriate if there is no genuine issue  
16 of material fact and the moving party is entitled to judgment as a  
17 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
18 initial responsibility of informing the court of the basis of its  
19 motion, and identifying those portions of "'pleadings, depositions,  
20 answers to interrogatories, and admissions on file, together with  
21 the affidavits, if any,' which it believes demonstrate the absence  
22 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
23 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

24 "If the moving party meets its initial burden of showing 'the  
25 absence of a material and triable issue of fact,' 'the burden then  
26 moves to the opposing party, who must present significant probative  
27 evidence tending to support its claim or defense.'" Intel Corp. v.  
28 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)

1 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
2 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
3 designate facts showing an issue for trial. Celotex, 477 U.S. at  
4 322-23.

5 The substantive law governing a claim determines whether a  
6 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
7 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
8 to the existence of a genuine issue of fact must be resolved  
9 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
10 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
11 drawn from the facts in the light most favorable to the nonmoving  
12 party. T.W. Elec. Serv., 809 F.2d at 630-31.

13 If the factual context makes the nonmoving party's claim as to  
14 the existence of a material issue of fact implausible, that party  
15 must come forward with more persuasive evidence to support his  
16 claim than would otherwise be necessary. Id.; In re Agricultural  
17 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
18 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
19 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

## 20 DISCUSSION

### 21 I. First Amendment Free Speech Claim

22 Plaintiff's claim is not a facial challenge to the ODOC mail  
23 regulations, but is one directed to the rejection of these two  
24 specific publications. The ODOC general mail regulation prohibits  
25 material that threatens or is detrimental to the security, safety,  
26 health, good order, or discipline of the facility, inmate  
27 regulation, or facilities criminal activity. OAR 291-131-0035(1),  
28 (2). The regulation then lists, by way of example only, eleven

1 specific categories of material that meet the standard. Id.

2 It is clear that a facial challenge to such a regulation would  
3 fail. Thornburgh v. Abbott, 490 U.S. 401, 419 (1989) (federal  
4 Bureau of Prisons regulations authorizing prison officials to  
5 reject incoming publications if determined to be detrimental to the  
6 security, good order, or discipline of the institution, or if it  
7 might facilitate criminal activity, facially valid).

8 Defendants assert that they are entitled to qualified immunity  
9 because under the analysis in Turner v. Safley, 482 U.S. 78 (1987),  
10 the prison mail regulation, and its application here, is reasonably  
11 related to a legitimate penological objective. While defendants  
12 label their motion as one brought on the basis of qualified  
13 immunity, and they devote more than three pages of their brief to  
14 the standards for adjudicating qualified immunity, their analysis  
15 bears no relation to the appropriate qualified immunity inquiries  
16 of whether the facts stated by plaintiff demonstrate that a  
17 constitutional violation has occurred and if so, whether that right  
18 was clearly established at the time the alleged violation occurred,  
19 and whether the contours of the right were clear enough that a  
20 reasonable officer would have understood that what he or she was  
21 doing violated that right. Moreno v. Baca, No. 02-55627, 2005 WL  
22 517851, at \*3 (9th Cir. Mar. 7, 2005). Rather, defendants simply  
23 argue the merits of the claims.

24 I conclude that I need not address the qualified immunity  
25 issue because I agree with defendants that they should prevail on  
26 the merits.

27 Defendants correctly cite the four-part test announced in  
28 Turner as the appropriate analysis. Turner explained that "when a



1 prison regulation impinges on inmates' constitutional rights, the  
2 regulation is valid if it is reasonably related to legitimate  
3 penological interests." Turner, 482 U.S. at 89. The Court stated  
4 that "such a standard is necessary if prison administrators and not  
5 the courts are to make the difficult judgments concerning  
6 institutional operations." Id. (internal quotation, brackets, and  
7 ellipsis omitted). "The Turner analysis applies equally to facial  
8 and 'as applied' challenges." Bahrampour v. Lampert, 356 F.3d 969,  
9 975 (9th Cir. 2004).

10 A. Content Neutral/Legitimate Penological Interest

11 The first Turner factor examines if the regulations are  
12 content neutral and are rationally connected to a legitimate  
13 penological interest. Turner, 482 U.S. at 89-90. "In the prison  
14 context, regulations that apply to specific types of content due to  
15 specific inherent risks or harms are considered to be content  
16 neutral." Bahrampour, 356 F.3d at 975.

17 Geer explains that "Cracking the Code, Third Edition"  
18 advocates passive resistance against authority which is  
19 unauthorized in a correctional facility. Geer Affid. at ¶ 10. He  
20 states that allowing an inmate to behave in this manner would cause  
21 other inmates to imitate the behavior and create a general  
22 weakening of the ODOC staff's ability to maintain order. Id.

23 Defendants' Exhibit 103 contains excerpts from "Cracking the  
24 Code." Defts' Exh. 103. It is challenging to succinctly explain  
25 the theories advocated in this book. The book suggests its  
26 affiliation with a "Redemptionist" philosophy. E.g., Id. at p. 8.  
27 Redemptionists believe that citizens of the United States have been  
28 placed as collateral in bond for the security of the United States

1 Department of the Treasury and have been placed on the rolls of the  
2 International Monetary Fund (IMF) in lieu of the national debt.  
3 Supp'l Geer Affid. at ¶ 6; Defts' Exh. 102 (Article from Anti-  
4 Defamation League entitled "Sovereign Citizen Movement" with  
5 section explaining Redemptionist theory); Defts' Exh. 104 (Article  
6 from Southern Poverty Law Center explaining Redemptionist  
7 philosophy).

8 Redemptionists assign an imaginary account number to some sort  
9 of direct treasury account, advocate that this direct treasury  
10 account has a balance equal to the monetary value the government  
11 places on the life of an individual, and then charge against this  
12 direct treasury account through the use of fraudulent checks called  
13 "sight drafts" by making written demand to the Department of  
14 Treasury for payments from the account. Id. The sight drafts  
15 appear to be real checks and business and financial institutions  
16 run the risk of cashing them before they discover the fraud. Id.;  
17 see also Attchmt 2 to Supp'l Geer Affid. (samples of various  
18 documents including sight draft purported to be drawn on Department  
19 of Treasury account).

20 Redemptionists believe government has no power over the live  
21 body of a person and all taxes, mortgage interest rates, and  
22 criminal convictions are against a "strawman" likeness of that live  
23 body. Id. Redemptionists then file UCC filings claiming their  
24 strawman is a commercial vehicle and make written demands for  
25 payment of services performed by the strawman or use of their  
26 copyrighted strawman name. Id.

27 As to "One Man Out," Geer explains that it too advocates  
28 passive resistance to authority, particularly law enforcement and

1 government. Id. at ¶ 15. He states that the publication advocates  
2 and promotes business transactions through unauthorized channels to  
3 passively resist authority in any form. Id. He further states  
4 that any instruction or avocation of criminal behavior to inmates  
5 in ODOC custody is in direct opposition to the goal of ODOC's  
6 accountability model. Id.

7 Attachment 4 to Geer's Affidavit consists of pages from "One  
8 Man Out." The Table of Contents reveals that the book consists of  
9 some basic instructions and copies of various forms including a  
10 UCC-1 financing statement, various Internal Revenue Service forms,  
11 a notice of "sovereign status," various forms entitled "non-  
12 negotiable charge-back," including one for birth registration,  
13 birth certificate, military certificate, and social security card,  
14 and more. Attchmt 4 to Geer's Affid. Given that the subtitle of  
15 the publication is "The Redemption Process Formulated for those  
16 Incarcerated," the link with the Redemption movement is clear.

17 Over the years, various courts in various contexts have  
18 addressed some of the issues raised by the tactics used by the  
19 Redemptionist or sovereign citizen movement. E.g. United States v.  
20 Boos, 166 F.3d 1222, 1999 WL 12741 (10th Cir. 1999) (unpublished)  
21 (defendants convicted of corruptly endeavoring to obstruct or  
22 impede the due administration of the internal revenue laws by  
23 filing false UCC-1 financing statements listing the two IRS agents  
24 who attempted to collect defendants' back taxes as debtors); United  
25 States v. Fulbright, 105 F.3d 443, 452 (9th Cir. 1997) (noting, in  
26 case where defendant mailed false arrest warrants to bankruptcy  
27 judge and attempted to file false UCC-1 forms, that filing a false  
28 UCC form regarding the judge is prohibited by the statutes at issue

1 in the case - 18 U.S.C. § 372 (conspiracy to impede or injure  
2 federal officers); (18 U.S.C. § 1503 (obstruction of justice by  
3 intimidating or injuring federal officers)); United States v.  
4 Hilgeford, 7 F.3d 1340, 1342 (7th Cir. 1993) (rejecting as  
5 frivolous argument that an individual is a sovereign citizen of a  
6 state who is not subject to the jurisdiction of the United States  
7 and federal taxing authority); United Stats v. Orrego, No. 04 CV  
8 0008 SJ, 2004 WL 1447954, at \*2 (E.D.N.Y. June 22, 2004)  
9 (defendant's claim that he "copyrighted" his name, that a judge and  
10 an assistant United States attorney had used his name in  
11 fulfillment of their official duties without first obtaining  
12 permission to do so, and the filing of false liens against those  
13 individuals which contained false claims of payment, was a  
14 fraudulent scheme).

15 Based on the materials in the record and the cases indicating  
16 that the tactics advocated in these publications are unlawful,  
17 defendants demonstrate that the rejection of these books is related  
18 to a legitimate penological interest. The books urge their readers  
19 to commence a campaign of "paper terrorism" by filing false  
20 documents under a frivolous theory with no basis in reason. The  
21 resulting activity is unlawful. Corrections officials have a  
22 legitimate penological interest in keeping such material out of  
23 their institutions. While the publications at issue here do not  
24 suggest the recipe for a bomb or a method for prison escape, they  
25 nonetheless contain information for engaging in fraudulent,  
26 unlawful schemes. This is not consistent with the mission of a  
27 prison.

28 The rejection of these two publications was rationally

1 connected to a legitimate penological interest. See Pope v.  
2 Hightower, 101 F.3d 1382, 1385 (11th Cir. 1996) (reduction of  
3 criminal activity qualifies as a legitimate governmental  
4 objective); McCabe v. Arave, 827 F.2d 634, 638 (9th Cir. 1987)  
5 (suggesting that literature advocating illegal activity may be  
6 prohibited in prison).

7 B. Alternative Means of Exercising the Right

8 The next consideration is "whether there are alternative means  
9 of exercising the right that remain open to prison inmates."  
10 Turner, 482 U.S. at 90. However, as explained by the District of  
11 Columbia Circuit, however, in considering this factor "the court  
12 does not view the right in terms of the materials excluded by the  
13 ban[.]" Kimberlin v. United States Dep't of Justice, 318 F.3d 228,  
14 234 (D.C. Cir. 2003) (internal quotation omitted).

15 Thus, here, the question is not whether there are alternative  
16 means for plaintiff to obtain these or similar publications, but  
17 whether plaintiff has the right to access publications regarding  
18 the Uniform Commercial Code unconnected to the Redemptionist or  
19 sovereign citizen movement. No such publications appear to be  
20 prohibited by applicable ODOC mail rules. Additionally, Geer  
21 states that inmates can conduct legitimate business transactions  
22 after approval from the superintendent's office. Geer Affid. at ¶  
23 15. Plaintiff has sufficient alternative means of exercising his  
24 rights.

25 C. Effect on Others

26 The third Turner factor "requires an examination of the  
27 potential effects on the guards, other inmates, and prison  
28 resources if the asserted right is protected by the courts."

1 Bahrampour, 356 F.3d at 975. When accommodation of an asserted  
2 right will have a significant "ripple effect" on fellow inmates or  
3 on prison staff, courts should be particularly deferential to the  
4 informed discretion of corrections officials. Turner, 482 U.S. at  
5 90.

6 Defendants contend that the reasons Geer states as justifying  
7 penological objectives for the rejection of the publications  
8 demonstrate a significant negative ripple effect which could arise  
9 from the accommodation of the asserted right. Perhaps less  
10 apparent here than in other similar cases, I agree with defendants.  
11 Although posing no direct physical threat to the guards or other  
12 inmates, the publications, in advocating criminal activity and  
13 passing it off as a legitimate means of fiscal responsibility,  
14 could contribute to the growth of an anti-authority attitude and  
15 could establish a context for disputes over the legitimacy of the  
16 tactics advocated. And, as Geer notes, the passive resistance to  
17 authority alluded to in the publications could be imitated by other  
18 inmates, resulting in widespread anti-authority sentiment which in  
19 turn could create a weakening of ODOC staff's ability to maintain  
20 order.

#### 21 D. Alternative Solutions

22 The fourth Turner factor examines whether there are  
23 alternative solutions that would preserve the inmate's  
24 constitutional rights. Bahrampour, 356 F.3d at 976.

25 If there are easily implemented and equally effective  
26 alternatives to the challenged regulations, the court may  
27 conclude that the regulations are an "exaggerated  
28 response" to the legitimate governmental interest. . . .  
If an inmate provides an alternative solution that will  
protect his rights at de minimis cost to valid  
penological interests, it likewise is evidence of an

1 exaggerated response. . . . If there are no obvious  
2 alternatives, and if the inmate only presents solutions  
3 that will negatively impact valid penological interests,  
then courts will view the absence of ready alternatives  
as evidence of a reasonable regulation.

4 Id. (citations omitted).

5 Plaintiff suggests that defendants can redact the offending  
6 portions of the material. He also objects to defendants' refusal  
7 to mail the rejected books to his home address. Finally, in his  
8 request for injunctive relief, he requests that the ODOC be ordered  
9 to publish a list of rejected publications along with its reasons,  
10 on a website and have a hard copy available at institution law  
11 libraries, and that the ODOC be ordered to develop a method to pre-  
12 authorize publications. I address plaintiff's suggested  
13 alternatives in turn.

14 1. Redaction

15 Geer states that ODOC mailrooms, as of September 2002,  
16 processed an average of 24,000 pieces of mail each day for inmates  
17 in all Oregon facilities. Geer Affid. at ¶ 23. As Geer notes, the  
18 number of mail items processed today is likely considerably higher  
19 because previously prohibited bulk mail is now processed along with  
20 other mail items. Id. Additionally, the prison population has  
21 risen since September 2002, adding to the number of pieces of mail  
22 sent to ODOC institutions as a whole. Id.

23 During 2002, ODOC mailrooms rejected approximately 1 million  
24 mail items. Id. at ¶ 25. ODOC staff reviewed and rejected 443  
25 publications for content, and reviewed and allowed another 76  
26 publications. Id.

27 Geer states that redacting portions of publications creates  
28 many problems. Id. at ¶¶ 30, 31. Redaction could potentially

1 destroy the publication, especially if it contained many violations  
2 or if the reverse side of the violated material contained critical  
3 information. Id. at ¶ 30. If the publication were valuable, rare,  
4 or hard to find, the inmate would not appreciate the offending  
5 portions being removed. Id.

6 Additionally, redacting would require a significant amount of  
7 staff time and energy. Id. at ¶ 31. For example, Geer explains,  
8 one popular publication received by 1,000 inmates may have three  
9 pages of an issue which violate the rules. Id. If mailroom staff  
10 were required to redact, they would need to individually process  
11 each publication before it could be forwarded to the inmate. Id.  
12 This manual labor would have to be performed in addition to all  
13 normal, day to day mailroom activity. Id. It simply would not be  
14 feasible to perform the redaction in a timely manner.

15 Plaintiff's proposed redaction alternative is not reasonable.  
16 Defendants' evidence shows that the administrative burden created  
17 by a case by case redaction policy would be great. Moreover, the  
18 Supreme Court in Thornburgh approved of an "all or nothing"  
19 regulation which banned the entire publication. Thornburgh, 490  
20 U.S. at 418-19. Redaction is not a de minimis alternative.  
21 Finally, even if redaction was an easily implemented option in  
22 theory, it would be difficult to apply in this case where the  
23 offending material is spread throughout the publications.

24 Plaintiff next suggests that rather than sending the  
25 publications back to the publisher, ODOC should send them to  
26 plaintiff's home where the non-offending pages can be redacted.  
27 Aside from the fact that, as noted in the preceding paragraph, the  
28 offending material is spread throughout the publications and



1 redaction is likely a practical impossibility, defendants are under  
2 no constitutional obligation to direct that the book be sent  
3 anywhere other than returned to sender. Geer Affid. at ¶ 19  
4 (noting the lack of mailroom staff, storage space, or time  
5 available to process the thousands of publications that would be  
6 affected if inmates could designate an alternative address for a  
7 rejected publication). Inmates may direct the publisher to mail  
8 the publication to another address. Id.

9 Finally, plaintiff requests that ODOC publish a list of  
10 rejected publications to make available on a website and in  
11 institution law libraries and that ODOC pre-authorize publications.  
12 Although neither of these proposals are actually alternatives which  
13 would result in plaintiff receiving the rejected publications, I  
14 note here that inmates may request a copy of the list of rejected  
15 publications for \$.50 per page. Id. at ¶ 35. Because the list  
16 changes frequently, inmates can send a written inmate communication  
17 to mailroom staff or to Geer if they have a question about a  
18 particular publication. Id. As to preauthorization, the list of  
19 rejected publications may be viewed as the flip side of a  
20 preauthorization list. That is, if the publication is not on the  
21 rejected list, the inmate will likely receive it.

22 Geer explains that the ODOC mail rules provide for  
23 preauthorization of packages not received directly from a  
24 publisher, but no preauthorization is received for books sent  
25 directly from a publisher because there is less likelihood of  
26 introducing contraband. Id. at ¶ 37. ODOC recommends that inmates  
27 check the rejected list before ordering a publication. Id.  
28 However, Geer explains, that even with materials not on the

1 rejected list, a package is inspected and still could be rejected  
2 once its contents are examined. Id. Nothing more than what ODOC  
3 already does is constitutionally required in regard to publishing  
4 a rejected list and preauthorizing material.

5 In summary, on plaintiff's First Amendment free speech claim,  
6 defendants establish that the rejection of these two books is  
7 rationally related to a legitimate penological interest, that  
8 plaintiff has alternative means of exercising his First Amendment  
9 rights, that the impact of plaintiff's being allowed to receive  
10 these publications would negatively impact the institution, and  
11 that there are no ready alternatives to prohibiting the materials  
12 and sending them back to the publisher. I recommend that  
13 defendants' motion on the First Amendment free speech claim be  
14 granted.

## 15 II. Due Process Claim

16 In plaintiff's next claim, he contends that his due process  
17 rights have been violated because ODOC personnel failed to follow  
18 ODOC rules for mail rejection. However, violations of state law or  
19 state administrative rules do not provide a basis for a section  
20 1983 claim. See Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir.  
21 2003) (to allege a section 1983 claim, plaintiff must show he or  
22 she was deprived of a right secured by the Constitution and laws of  
23 the United States; section 1983 is a "method for vindicating  
24 federal rights"); Ybarra v. Bastian, 647 F.2d 891, 892 (9th Cir.  
25 1981) (only federal rights, privileges, or immunities are protected  
26 by section 1983; "[v]iolations of state law alone are  
27 insufficient.").

28 To the extent plaintiff's due process claim can be viewed as

1 a facial challenge the ODOC mail rules, it has no merit.  
2 "Withholding delivery of inmate mail must be accompanied by minimum  
3 procedural safeguards." Sorrels v. McKee, 290 F.3d 965, 972 (9th  
4 Cir. 2002) (internal quotation and brackets omitted). The inmate  
5 has a Fourteenth Amendment due process right in receiving notice  
6 that his or her incoming mail is being withheld by prison  
7 authorities. Id. In addition to notice, the inmate is  
8 constitutionally entitled to administrative review on the initial  
9 rejection. See Prison Legal News v. Cook, 238 F.3d 1145, 1152 (9th  
10 Cir. 2001) (failure to provide notice and administrative review of  
11 mail rejections deprives inmates of due process safeguards).

12 The ODOC administrative rules on prison mail provide for the  
13 constitutionally mandated due process notice and administrative  
14 review. OAR 291-131-0037(6) provides that when a publication from  
15 a non-inmate sender is rejected, the sender and the intended inmate  
16 recipient shall be notified of the rejection of the mail, including  
17 the reasons, on a Publication Violation Notice. Another rule  
18 provides that either a non-inmate sender or an intended inmate  
19 recipient of a rejected publication may request an administrative  
20 review within thirty days of the date of the rejection notice. OAR  
21 291-131-0050(1)(a)(A), (B). Rules governing the administrative  
22 review require the functional unit manager's designee to review the  
23 original decision, the administrative review request, and where  
24 necessary, the rejected materials. OAR 291-131-0050(3)(a), (b).  
25 The designee must be someone other than the employee who originally  
26 rejected the publication. OAR 291-131-0050(3)(a).

27 Unless it is determined that the inmate's review of the  
28 rejected material may provide the inmate with information of a

1 "nature which is deemed to pose a threat or detriment to the  
2 security, good order or discipline of the facility or to encourage  
3 or instruct in criminal activity," the inmate is permitted to  
4 review the rejected mail for purposes of the administrative review.  
5 OAR 291-131-0050(3)(c). The designee then is required to deliver  
6 a written recommended decision to the functional unit manager for  
7 his or her review and approval. OAR 291-131-0050(d). The  
8 functional unit manager, or his or her designee, is required to  
9 review the recommended decision and either affirm, reverse, or  
10 otherwise modify the original mail rejection decision in writing.  
11 OAR 291-131-0050(e).

12 These rules satisfy the constitutional due process  
13 requirements for rejection of inmate mail. See Procunier v.  
14 Martinez, 416 U.S. 396, 417-19 (1974) (upholding procedural  
15 safeguards that an inmate be notified of the rejection of a letter  
16 written by or addressed to him, that the author of that letter be  
17 given a reasonable opportunity to protest that decision, and that  
18 complaints be referred to a prison official other than the person  
19 who originally disapproved the correspondence), overruled on other  
20 grounds, Thornburgh, 490 U.S. at 413-14; Rooks v. Zavares, No.  
21 Civ.A. 99-B-631, 2001 WL 34047959, at \*31 (D. Colo. Jan. 25, 2001)  
22 (prison provided constitutional due process protections when  
23 plaintiff was allowed to grieve rejected publications and responses  
24 to grievances were made by prisons officials other than those who  
25 originally rejected the publications even though no actual hearing  
26 held).

27 Due process rights are not created by state procedural rules.  
28 Olim v. Wakinekona, 461 U.S. 238, 250 (1983). "Thus, although a

1 state may have violated its own state procedural rules, no  
2 constitutional guarantee has been violated unless the state also  
3 failed to comply with the procedural requirements mandated by the  
4 Constitution." Winburn v. Bologna, 979 F. Supp. 531, 535 (W.D.  
5 Mich. 1997).

6 Plaintiff contends that defendants violated certain ODOC rules  
7 regarding the rejected publications. The undisputed evidence,  
8 however, shows that plaintiff received notice as to the rejection  
9 of both "Cracking the Code, Third Edition," and "One Man Out," and  
10 received administrative review of those rejections by prison  
11 officials who were not the persons who initially rejected the  
12 publications. For "Cracking the Code," Wilson conducted the review  
13 and her review was then reviewed and affirmed by Hall. For "One  
14 Man Out," Wilson conducted the review and then her review was  
15 reviewed and affirmed by Hoeye. Even if plaintiff is correct that  
16 defendants failed to comply with ODOC rules, because plaintiff  
17 received notice and an administrative hearing, he fails to show  
18 that any violation of ODOC rules resulted in a violation of his  
19 federal due process rights.

### 20 III. Peaceable Assembly Claim

21 In this claim, plaintiff contends that defendants' actions in  
22 rejecting the two publications restrict the "lawful assembly of  
23 citizens who advocate the use of the UCC." Compl. at p. 6. The  
24 First Amendment guarantees "the right of the people peaceably to  
25 assemble[.]" U.S. Const. amend. I. While incarceration does not  
26 deprive an individual of all constitutional rights, it is well  
27 established that a prisoner's associational rights are severely and  
28 "necessarily curtailed by the realities of confinement." Jones v.

1 North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132  
2 (1977).

3 Turner's application is not limited to cases involving the  
4 free speech clause of the First Amendment. Rather, it provides the  
5 appropriate analysis for other questions regarding First Amendment  
6 rights for prisoners. E.g., Hart v. Cambra, No. C 96-0924 SI, 1997  
7 WL 564059, at \*7 (N.D. Cal. Aug. 22, 1997) (applying Turner to  
8 prisoner's peaceable assembly claim), aff'd, 161 F.3d 12 (9th Cir.  
9 1998). The outcome under Turner for plaintiff's peaceable assembly  
10 claim is no different than it is for his free speech claim.

#### 11 IV. Oregon Constitution Claims

12 Plaintiff alleges that defendants' actions violated various  
13 provisions of the Oregon Constitution. Defendants request that if  
14 their summary judgment motion is granted, that the Court decline to  
15 exercise supplemental jurisdiction over the remaining state  
16 constitutional claims. I recommend that defendants' request be  
17 granted.

18 Under the federal supplemental jurisdiction statute, a court  
19 may decline to exercise jurisdiction over a supplemental state law  
20 claim if:

- 21 (1) the claim raises a novel or complex issue of State  
22 law;
- 23 (2) the claim substantially predominates over the claim  
24 or claims over which the district court has original  
25 jurisdiction;
- 26 (3) the district court has dismissed all claims over  
27 which it has original jurisdiction; or
- 28 (4) in exceptional circumstances, there are other  
compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

27 Here, both subsections (1) and (3) support declining  
28 jurisdiction. Plaintiff's state constitutional claims raise

1 complex issues of state law and this Court is now dismissing all  
2 claims over which it has original jurisdiction. Thus, I recommend  
3 that plaintiff's state constitutional claims be dismissed pursuant  
4 to 28 U.S.C. § 1367(c)(1) and (3).

#### 5 V. Plaintiff's Motion to Strike

6 Plaintiff moves to strike defendants' reply memorandum and  
7 Geer's supplemental affidavit submitted with the reply. Plaintiff  
8 first objects that defendants' reply does not contain a paragraph  
9 by paragraph numbered reply to plaintiff's response to defendants'  
10 initial Concise Statement of Material Fact. But, plaintiff's  
11 response to defendants' Concise Statement does not require a reply  
12 by defendants when plaintiff has not put forth his own affirmative  
13 factual assertions in separately numbered paragraphs but rather has  
14 only responded to defendants' assertions.

15 Next, plaintiff contends that defendants have inappropriately  
16 asserted new facts with their reply materials. However, in the  
17 motion to strike, plaintiff includes a sur-reply in the form of  
18 both argument and relevant facts. I have read this material in  
19 consideration of the motion for summary judgment. Given that  
20 plaintiff has had, in effect, an opportunity to reply to  
21 defendants' reply, the motion to strike is denied.

#### 22 CONCLUSION

23 I recommend that defendants' motion for summary judgment (#16)  
24 be granted and that a Judgment in defendants' favor be entered. I  
25 deny plaintiff's motion to strike (#29).

#### 26 SCHEDULING ORDER

27 The above Findings and Recommendation will be referred to a  
28 United States District Judge for review. Objections, if any, are

1 due April 8, 2005. If no objections are filed, review of the  
2 Findings and Recommendation will go under advisement on that date.

3 If objections are filed, a response to the objections is due  
4 April 22, 2005, and the review of the Findings and Recommendation  
5 will go under advisement on that date.

6 IT IS SO ORDERED.

7 Dated this 24th day of March, 2005.

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10 /s/ Dennis James Hubel  
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12 Dennis James Hubel  
13 United States Magistrate Judge  
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